Supreme Court, U.S.
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No. 80-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

HENDRICKS COUNTY RURAL ELECTRIC
MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

MALLEABLE IRON RANGE COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent Hendricks County Rural Electric Membership Corporation files this Brief in Opposition to the

Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as filed by the Solicitor General, Respondent having been granted by the Clerk an extension until February 2, 1981, in which to file its Brief.

JURISDICTION

The Solicitor General on behalf of the Petitioner, National Labor Relations Board, attempts to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1) indicating a timely filing within ninety (90) days plus an additionally granted forty-five (45) days from the July 21, 1980, Judgment of the Court of Appeals in *Hendricks II* (Petitioner's App. B, 14a-15a) denying enforcement of the Board's Supplemental Order. Respondent Hendricks County Rural Electric Membership Corporation contends that jurisdiction does not exist due to the untimeliness of the filing of the Petitioner's Petition for A Writ of Certiorari. The Judgment of the Court of Appeals in *Hendricks I* (Respondent's App. A, *infra*, 1a-2a) reversing the Board's Order and remanding, was entered by that Court on July 26, 1979, which is the appropriate date from which the appeal period began to run regarding the question being presented to this Court by the Petitioner.

STATEMENT OF THE CASE

1. The Administrative Law Judge (ALJ) and the Board found that on May 9, 1977, the "top executive officer" and "General Manager" of the Hendricks County Rural Electric Membership Corporation (Hendricks or REMC) had discharged his secretary, Mary Weatherman, because she had signed a petition directed to the REMC's board of directors requesting that they reconsider the board's decision not to reinstate disabled Lloyd Hadley as an employee. Mr. Hadley became disabled in February, 1976, as a result of an employment accident, and in April, 1977, the board notified Hadley that he would not be reinstated as an employee. (P. App. E, 38a-39a) In addition to

contesting that the discharge was an unfair labor practice, Hendricks claimed at the evidentiary hearing and in its Trial Brief of February 6, 1978, to the ALJ, that Weatherman was excluded from the coverage of the National Labor Relations Act (Act) and that the Board lacked jurisdiction for two separate reasons: (1) As a "confidential employee" in her capacity as secretary to the General Manager and top executive and operating officer of the employer, and (2) As a person working in "personnel and employment departments." Although the ALJ specifically concluded "that Weatherman was not a confidential employee as the Board defines that term," he made no decision as to whether she was excluded from the Act as an employee working in "personnel and employment departments." (P. App. E, 49a)

However, in concluding that Weatherman was not a confidential employee under the Board's "labor nexus" standard, the ALJ determined that Weatherman opened mail addressed to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the union, kept and processed all insurance claims of employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings, and typed minutes of the meetings of the REMC's board of directors including minutes containing references to Hadley's request for reinstatement and to other personnel matters. Additionally, the ALJ stated that Dillon was present at labor negotiation meetings with the union and collected papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations; and that Assistant Manager Spencer had testified that while he (Spencer) made determinations of "management policy concerning the interpretations of the labor contract with the IBEW" union, that such determinations were approved by Dillon. (P. App. E, 45a-47a)

Although Hendricks filed five specific Exceptions to the Decision of the ALJ with the Board including both jurisdictional issues, the Board adopted the Decision and Order of the ALJ without specifically ruling upon the Exceptions presented by Hendricks. (P. App. E, 33a-35a) Thereafter, Hendricks filed a Petition for Review of Order of the NLRB with the United States Court of Appeals for the Seventh Circuit. The NLRB petitioned the Court for enforcement of its Order. Although concurring that she was not a "confidential employee" under the Board's "labor nexus" standard, the Court of Appeals reversed the Board's Order and remanded stating that it was "necessary to remand the decision for a new determination of her 'employee' status." (P. App. D, 24a, 26a, 27a; R. App. A, 1a & 2a) The Court of Appeals after discussing the decision of the Supreme Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), held that "The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act" and concluded that the ALJ had "limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations." The Court of Appeals remanded the case to the Board "for a determination of whether 'by the nature of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.' H.R. 3020 §2(12)(C), 80th Cong., 1st Sess. (1947)." (P. App. D, 31a)

2. On October 10, 1979, the Board accepted the Court's remand and advised the parties that they may file "Statements of Position with the Board with respect to the issues raised by the remand." In its Statement of Position, Hendricks stated "that the Board should order a reopening of the proceedings to present further evidence regarding

the issues on remand" and specifically pointed out to the Board that the REMC competes with another utility and was involved in litigation cases with that utility during Weatherman's employment. (P. App. A, 3a) The Board failed to rule upon Hendricks' request to reopen the record on remand, and issued its Supplemental Decision and Order on January 22, 1980, and stated therein that "Accepting the court's criteria for resolving questions of confidential employee status as the law of this case only, we find that Weatherman was not a confidential employee." (P. App. C, 18a & 19a) Hendricks again filed a Petition for Review with the Court of Appeals, and thereafter, the NLRB petitioned the Court of Appeals for enforcement of its Order. The Court of Appeals granted the Petition for Review and denied enforcement of the Order stating that "we adhere to everything we said in *Hendricks" I* and holding that the Board had erred in not allowing a new evidentiary record and by not applying the new standard to define a confidential employee as determined in *Hendricks I*. The Court found and held as follows:

> The Board did not reopen the proceedings under the different standard, did not take any additional evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record, but actually reapplies the old standard incorporating the labor nexus. (P. App. A, 7a & 8a)

SUMMARY OF ARGUMENT

The Court should deny the Petitioner's Petition for A Writ of Certiorari for the following reasons:

1. Jurisdiction does not exist pursuant to 28 U.S.C. 1254(1) since the Government's Petition for A Writ of Certiorari was not filed within ninety (90) days after the Judgment of the Court of Appeals in *Hendricks I* of July 26,

1979, which date commenced the appeal time period since the Board on remand failed to abide by the Order and to apply the law specified by the Court of Appeals.

2. The Supreme Court has previously settled the issue presented in the Petition for A Writ of Certiorari by holding in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), that employees "impliedly excluded" from the coverage of the National Labor Relations Act "were persons working in 'labor relations, personnel and employment deparments,' and 'confidential employees'" and that "The discussion of 'confidential employees' in both the House and Conference reports, however, unmistakably refers to that term as defined in the House bill which was not limited just to those in 'labor relations.'"

3. A conflict does not exist regarding the definition of the "confidential employee" exclusion between the Seventh Circuit and the other three (3) circuits since the cases cited by the Solicitor General in the Petition either did not involve the definition of this exclusion or did not involve arguments as to the proper legal standard itself, but rather only the application of the standard.

ARGUMENT

1. The Court of Appeals in *Hendricks II* after first stating that "we adhere to everything we said in *Hendricks" I* regarding the exclusion of "confidential employees" from the Act without limiting confidentiality to "labor relations," specifically found that the Board on remand should have reopened the evidentiary record and had failed to apply the law established in *Hendricks I*. The court stated "We are asked to enforce an order which purports to apply the new standard to the old record but actually reapplies the old standard incorporating the labor nexus." (P. App. A, 6a-8a) The Court of Appeals found that "reading the administrative record makes it obvious that the admonitions [of the ALJ] were observed inasmuch as there is clearly a conscious effort by all participants to restrict the evidence to that which pertains to labor or personnel matters." "The Board did not reopen the proceedings under the different standard, did not take any additional evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before" even though the company had asked that the proceedings be reopened to present further evidence. (P. App. A, 7a) The NLRB did not request a rehearing in banc of any determination made by the panel in *Hendricks I* or in *Hendricks II* (P. App. A, 5a), and has not presented as an issue to this Court the conclusion of the Court of Appeals that the Board failed to comply with its decision and remand order in *Hendricks I*. Rather, the Board now asserts that the law set forth by the Court of Appeals as to the definition of "confidential employees" is incorrect.

In *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 378 & 379 (1965), the Court, by a seven-member majority, held as follows:

> After a court of appeals has set aside an order of the Commission on a point of law, the Commission may seek certiorari if it disagrees with the court's legal

> conclusion. Section 5(i) of the Federal Trade Commission Act contemplates that when the time for filing a petition for certiorari has passed without a petition being filed, the Commission will enter an order in accordance with the mandate of the court of appeals. The Commission may not merely restate its former position in a new order and then apply for certiorari when the court of appeals reiterates its previous objection. As was said in *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20, 97 L.Ed. 15, 20, 73 S.Ct. 85, 'If the Court did no more by the second judgment than to restate what it had decided by the first one... the 90 days would start to run from the first judgment.' To the same effect see *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 97 L.Ed. 245, 251, 73 S.Ct. 245.

In discussing the application of this premise, the Court, in *Federal Trade Comm'n v. Colgate-Palmolive Co., supra*, at 379, further held that "Obviously, the court which drafted the mandate is normally in the best position to determine whether the Commission's subsequent order is consistent with the mandate, but this Court is never foreclosed from determining the issue for itself." Similar to Section 5(i) of the Federal Trade Commission Act, 29 U.S.C. §160(e) contemplates that the NLRB will enter an order in accordance with the mandate of the court of appeals unless it timely files a petition for writ with the Supreme Court. (R. App. B, 3a & 4a) The Supreme Court has held that "the statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter, it is well established that the Court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made." *Ford Motor Company v. NLRB*, 305 U.S. 364, 373, citing *Federal Trade Comm'n v. Curtis Pub. Co.*, 260 U.S. 568, 580 & 583, 67 L.Ed. 408, 413 & 414, 43 S.Ct. 210. ¶29 U.S.C. §160(e) provides in its relevant part as follows:

> Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review...by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

The Court of Appeals in *Hendricks II*, discussed the failure of the Board to reopen the evidentiary proceedings, stating that "If we had believed that the prior record was sufficient to support a finding under the *Bell Aerospace* standard, we would not have remanded the proceeding to the Board" and that "When an erroneous standard for the admission of evidence is used, it follows almost mandatorily that a new record is needed, not only to add evidence in patchwork fashion but also possibly to rehear all the relevant evidence under the different admission standard." (P. App. A, 7a) Additionally, the true position of the Board regarding the new legal standard was noted by the Court of Appeals stating as follows in *Hendricks II*: (P. App. A, 5a)

> Although the Board has accepted our prior decision in this case, in at least one subsequent case pending on review before us, *Malleable Iron Range Co. v. NLRB*, No. 79-1991, the Board strongly urges that our prior decision be overruled, either on the basis that the Supreme Court was in error or mislead as to the legislative history in footnote 12 or because of the court's later opinion in *NLRB v. Yeshiva University*, 100 S.Ct. 856 (1980).

In finding that the Board had applied the old standard incorporating the labor nexus, the Court of Appeals also disagreed with the "Board's gratuitous conclusion that the Company 'is a cooperative, and that all members *presumably* have access to [its] documents....'" (P. App. A, 8a)

The decision and Judgment in *Hendricks II* merely restated the decision in *Hendricks I*, without any expansion

of that decision, and then held that the Board had not complied with the remand and denied enforcement of the Board's Order. In *Hendricks I*, the Court of Appeals had concluded that all confidential employees and not just confidential secretaries were excluded from the Act by stating:

> Relying on the legislative history, the Supreme Court in *Bell Aerospace* concluded that confidential employees, including confidential secretaries, were persons "who both the House and the Senate believed were plainly outside the Act." 416 U.S. at 283 (P. App. D, 29a)

Justice Douglas in *Federal Power Comm'n v. Idaho Power Co., supra*, stated in expressing the majority opinion that "If the court did no more by the second judgment than to restate what it had decided by the first one... the 90 days would start to run from the first judgment." Therefore, the Board's Petition for A Writ of Certiorari is untimely by 15 months as to the jurisdictional exclusion standard raised therein since the Court of Appeals determined that standard in its Judgment of July 26, 1979, and the Board on remand failed to apply the law so established.

2. The Supreme Court, in holding that buyers were managerial employees excluded from the jurisdiction of the National Labor Relations Act in *NLRB v. Bell Aerospace Co., supra*, 283, stated as a basis for its decision as follows:

> There were other persons, however, who both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees."

The Supreme Court, in *Bell Aerospace, supra*, at 283, n.12, further stated as follows:

> In 1946, in *Ford Motor Company*, 66 N.L.R.B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

Although disagreeing with the majority opinion delivered by Justice Powell, that managerial employees are not covered by the Act, the minority opinion issued by Justice White agreed that "The House Managers' statement accompanying the Conference Committee Report explains that the Act was not amended expressly to exclude labor relations and confidential employees from coverage under the Act, because it was already prevailing Board practice to exclude these employees." It found that Congress "expressed a desire to exclude only labor relations and confidential employees whom it thought the Board had previously held outside the Act..." *Bell Aerospace Co., supra*, at 304 & 305. Thus, the minority opinion did not take issue with the majority's decision that "confidential employees" were not limited just to those in labor relations, and in fact, held that Congress had expressed a desire to exclude both "labor relations and confidential employees," as two specified groups. The minority opinion in *Bell Aerospace* in arriving at this conclusion quoted a portion of H.R. Conference Report No. 510, 80th Cong., 1st Sess., 35-36 (1947) as follows in part at p. 303:

> "The conference agreement, in the definition of supervisor, limits such term to those individuals

> treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential employees as well, and it was not the intention of the conferees to alter this practice in any respect...."

Additionally, Justice White at p. 306 wrote "Perhaps it was clear to Congress that a confidential secretary's supervisor would be excluded by the Act, but such an individual would either be a confidential employee himself, or a supervisor, or both." In *Hendricks*, both the Board and the Court of Appeals found that the discharged employee was the "personal secretary to its [the Company's] general manager and chief executive officer." (P. App. A, 2a); and the Board found that the general manager attended labor negotiation meetings, collected papers relating to labor contract negotiations including positions developed by the REMC's negotiating committee and notes taken during negotiations, and approved "determinations of 'management policy concerning interpretations of the labor contract with the IBEW'" union. (P. App. E, 47a) Therefore, Weatherman was the personal secretary to a "'super' supervisor" and "confidential employee." *Bell Aerospace, supra*, 307, n.3. Congress intended to exclude as confidential "people who receive from their employers information that not only is confidential, but also that is not available to the public, or to competitors, or to employees generally." *Bell Aerospace, supra*, 283, n.12. This was the remand instruction in *Hendricks I*. (P. App. D, 31a)

The NLRB's Petition for A Writ requests the Court to review and approve the Board's restricted definition of "confidential employee," and states that the "Board's 'labor

nexus' test accords with the overall policy and legislative history of the National Labor Relations Act" by arguing a different interpretation of the legislative history of the Taft-Hartley Act from that concluded by this Court in *Bell Aerospace, supra.* The Solicitor General argues that the "conferees specifically rejected the House bill's broad exclusion, and followed the Senate's version..." and that "the conferees noted their approval of the 'prevailing Board practice,' and that practice—which has been consistently followed for at least eight years prior to 1947—merely accorded a special status to confidential employees meeting the 'labor nexus' test...." (Petition for A Writ, 22) Nevertheless, this Court has already held that both "labor relations" employees and "confidential employees" were "impliedly excluded" and "plainly outside the Act" and that "although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential' employees even under a broad definition of that term." *Bell Aerospace, supra,* 283 and n.12. The Court of Appeals, in *Hendricks II,* in reaffirming its prior decision, stated that "although the *Bell Aerospace* holding applied to managerial employees, the statement in note 12 about confidential employees was not a mere dictum, but was the basis, or at least part of the basis, upon which the holding itself was constructed." (P. App. A, 4a) Indeed, the Supreme Court recently reaffirmed *Bell Aerospace* stating in *NLRB v. Yeshiva University,* ___ U.S. ___, 63 L.Ed.2d 115, 125 & 126; 100 S.Ct. 856 (1980):

> Managerial employees are defined as those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *NLRB v. Bell Aerospace Co., supra,* 416 U.S. at 288....These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Id.,* at 283.... Although the Board has established no firm criteria

> for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

Thus, the Supreme Court has not limited even the managerial employee exclusion to only those implementing *labor relations* policy; and nevertheless, the Solicitor General contends that the labor nexus limitation should be applied to "those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.'"

3. The Solicitor General in the Petition cites three cases as being in conflict with the Seventh Circuit's decision in *Hendricks*, and as resulting in a conflict between the Seventh Circuit and the Eighth, Sixth and Ninth Circuits. However, the Eighth Circuit, in *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805 (1975), did not define the term "confidential employee," but merely defined the term "supervisor" in excluding a supervisor from the bargaining unit. Secondly, the Sixth Circuit in *NLRB v. Allied Products Corp.*, 548 F.2d 644, 648, 649 & 650 (1977), stated that it had "declined to treat secretaries as confidential unless the managers for whom they work are sufficiently engaged in labor management negotiations to warrant exclusion of their secretaries," and that the "secretaries must enjoy confidential status with respect to those labor relation functions." Yet, the Sixth Circuit held that the Board had erred in including in the bargaining unit the personal secretary to "the general manager and chief labor relations administrator of the plant," and indicated its decision was "in spite of those precedents and recognizing the narrow scope of our review." Also, the court in *Allied Products* found that the Board erred in including in the unit the secretary of a division manager holding that "Although he is not directly responsible for the Company's relationship with the Union, and although

he does not formulate, determine and effectuate company labor relations policy, nevertheless, he does formulate, determine and effectuate company-wide *management policies* which critically affect labor relations;" and the Court noted that this secretary substitutes for the general manager's secretary. *Allied Products* is not inconsistent with *Hendricks* since it does not apply the "labor nexus" standard.

Thirdly, the decision of the Ninth Circuit in *Union Oil Company of California v. NLRB*, 607 F.2d 852 (1979), does not discuss whether the term "confidential employee" should be limited to labor relations as opposed to a broad definition of that term. Rather, the Ninth Circuit held that "because there is substantial evidence that the computer operators acted as record custodians for persons who did not formulate or implement labor policy, we conclude that there is an adequate basis for the Board's ruling" including them in the bargaining unit. There is no indication in the Ninth Circuit's Opinion in *Union Oil* that the company contended that the labor nexus legal standard applied by the Board in defining the terms "confidential employees" was incorrect. Additionally, the exclusion of secretaries to top executive officers is not the issue in *Union Oil*, but only whether computer operators had a confidential relationship with the personnel supervisor. Therefore, the conflict preceived by the Solicitor General is not an apparent one as where circuits disagree whether a union offer to waive initiation fees for employees who sign recognition slips before the election constituted an unfair election practice and interfered with the rights of employees, *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 38 L.Ed.2d 495, 94 S.Ct. 495 (1973), or as where circuits disagree whether a union could waive the employee's right to distribute literature on the employer's premises. *NLRB v. The Magnavox Co.*, 415 U.S. 322, 39 L.Ed. 358, 94 S.Ct. 1099 (1974)

CONCLUSION

The Court should deny the Board's Petition for A Writ of Certiorari since jurisdiction does not exist in that the Petition was untimely filed with this Court, since the Court has already determined the question presented by the Petition in this Court's decision in *NLRB v. Bell Aerospace Co., supra*, and since the decisions cited by the Solicitor General as being in conflict with the decision of the Seventh Circuit in *Hendricks* do not meritoriously argue whether the labor nexus standard of the Board is the proper definition of "confidential employee."

Respectfully submitted,

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January 21, 1981

APPENDIX

APPENDIX A

Opinion by Judge Sprecher
Judge Bonsal dissenting

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 78-2127

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Dudley B. Bonsal, Senior
District Judge*

July 26, 1979

Hendricks County Rural Electric
Membership Corporation, Petitioner

vs.

National Labor Relations Board,
Respondent

Petition for Review of an Order
from the National Labor Relations Board

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* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board in this cause be, and the same is hereby, REVERSED, with costs, and REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX B

NATIONAL LABOR RELATIONS ACT

29 U.S.C. §160(e)

(e) Petition to court for enforcement of order—Proceedings—Review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code [28 USCS §2112]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be

taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28 [28 USCS §1254].

FEDERAL TRADE COMMISSION ACT

15 U.S.C. §45

(i) Order modified or set aside by court of appeals, when becomes final. If the order of the Commission is modified or set aside by the [circuit] court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.